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No. 10,189

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMPIRE OIL AND GAS CORPORATION (a corporation), and CHESTER WALKER COLGROVE, trading as Colusa Products Company,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTIONAL STATEMENT.

This is an appeal from the judgments of conviction (Tr. 308 and 310) of the District Court of the United States for the Northern District of California, Southern Division, convicting appellants on an information in three counts charging them with violations of Section 331(a) and 352(a), (b)(2) of Title 21 USCA, in that they unlawfully introduced and delivered for introduction in interstate commerce certain misbranded drugs. After pleas of not guilty, a jury trial was had, and both appellants were convicted on all three counts of the information.

The Court below had jurisdiction of this case under and pursuant to the provisions of Title 28 USCA, Section 41, subdivision (2). The jurisdiction of this Honorable Court is apparently invoked under the provisions of Title 28 USCA, Section 225, subdivision (a), first and subdivision (d).

FACTS OF THE CASE.

Appellants' views as to the true issues of this case are not in accord with those of appellee and as a result there will be no agreement as to the facts essential to a determination of those issues. Appellants' statement of the case (Appellants' Opening Brief, pp. 2-6) is *too limited in scope* and does not clearly and *impartially* set forth *all* the essential facts.

On March 24, 1942, the United States Attorney for the Northern District of California, filed an information in the Court below against appellants charging them with violations of the Federal Food, Drug and Cosmetic Act. The information is in three counts and the essential portions of each count allege as follows:

Count I:

> "That Empire Oil and Gas Corporation, * * * and Chester Walker Colgrove, President and Treasurer, said corporation trading under the fictitious name of Colusa Products Company, at Berkeley, State of California, did * * * on or about the 31st day of January, in the year nineteen hundred and forty-one, * * * unlawfully introduce and deliver for introduction in interstate commerce, from Berkeley, State of California, to

Mountainair, State of New Mexico * * * a certain package containing a number of bottles, each bottle containing a drug * * *."

(Then follows a description of the labeling of Colusa Natural *Oil* on the bottles and a partial statement of the contents of an accompanying circular and newspaper mat.)

"That the said drug * * * was then and there misbranded * * * in that the statements aforesaid, regarding the efficacy of said drug in the cure, mitigation, treatment or prevention of diseases in man * * * were false and misleading, in this, that the said statements represented and suggested that the said drug, when used alone or in conjunction with Colusa Natural Oil Capsules, would be efficacious in the treatment of eczema, psoriasis, acne, ringworm, Athlete's Foot, burns, cuts, poison ivy, and varicose ulcers, would act on surface skin irritations as a stimulant and would increase circulation and aid in healing; would be efficacious to relieve discomfort and pain; would be efficacious to restore the normal skin surface, and would be efficacious to kill or check disease germs; whereas, in truth and in fact, said drug, when used alone or in conjunction with Colusa Natural Oil Capsules, would not be efficacious in the treatment of eczema, psoriasis, acne, ringworm, Athlete's Foot, burns, cuts, poison ivy or varicose ulcers; would not act on surface skin irritations as a stimulant, would not increase circulation, and would not aid in healing; would not be efficacious to relieve discomfort or pain; inhibit the spreading of skin irritations, or restore the normal skin surface, and would not be efficacious to kill or check disease germs * * *". (Tr. 2-7).

Count II:

"That * * * (appellants) * * * did (at the same time and place recited in Count I) * * * unlawfully introduce and deliver for introduction in interstate commerce * * * a certain package containing a number of bottles, each bottle containing a drug * * *."

(Then follows a description of the labeling of Colusa Natural Oil *Capsules* and a statement of the contents of the circular and newspaper mat referred to in Count I.)

"That said drug * * * was then and there misbranded (in the manner alleged in Count I when used alone or in conjunction with Colusa Natural Oil) * * *". (Tr. 7-10).

Count III:

"That * * * (appellants) * * * did (at the time and place recited in Count I) * * * unlawfully introduce and deliver for introduction in interstate commerce * * * a certain package, containing a number of jars, each containing a drug * * *."

(Then follows a description of the labeling on the jars and a partial statement of the contents of an accompanying circular.)

"That said drug * * * was then and there misbranded * * * in that the statements aforesaid, appearing on the jar label and circular, as aforesaid, regarding the efficacy of said drug in the cure, mitigation, treatment or prevention of disease in man, were false and misleading, in this, that the said statements represented and suggested that said drug would be efficacious in the treatment of hemorrhoids and piles, whereas, in truth and fact, said drug would not be efficacious in the treatment of hemorrhoids or piles;

> "That said drug was further misbranded in that it was in package form and its label did not bear an accurate statement of the quantity of the contents in terms of weight or measure." (Tr. 10-12).

On April 10, 1942, appellants entered pleas of not guilty to all three counts of the information (Tr. 13). No demurrer or other objection to the information was filed excepting an oral motion made at the close of the trial to required appellee to elect as to which of the two alleged offenses covered by the third count of the information it desired to submit to the jury (Tr. 274). The case went to trial before a jury and on June 30, 1942, the jury returned a verdict of guilty as to both appellants on all three counts (Tr. 294).

The Court sentenced Chester Walker Colgrove to a fine of $500.00 on each count and imprisonment for six months in jail on each count and further ordered that the jail sentences should run concurrently, with a proviso for the discharge of Chester Walker Colgrove upon the payment of the fines (Tr. 310 and 311).

The Court sentenced the Empire Oil and Gas Corporation to a fine of $1.00 on each count (Tr. 309).

From these two judgments appellants take their present appeal.

At the close of the case appellants each moved the Court for directed verdicts of not guilty on each count of the information. These motions were denied (Tr. 273-274).

Before judgment was pronounced appellants each filed motions for new trial (Tr. 294-297) and in arrest of judgment (Tr. 296-298) which were denied.

In support of their contention that the judgments of the lower Court should be reversed, appellants argue:

"I. The Third Count is Duplicitous.

II. The Evidence is Insufficient to Warrant a Conviction.

III. The Trial Court Committed Highly Prejudicial Errors in Connection With the Testimony of Dr. C. E. Von Hoover, a Vital Defense Witness.

IV. The Trial Court Committed Prejudicial Error in Refusing to Admit in Evidence the Voluntary Testimonials Offered by the Defense.

V. The Trial Court Committed Various Other Prejudicial Errors at the Trial.

VI. The Trial Court Erred in its Instructions to the Jury."

The evidence relative to these contentions of appellants will be hereinafter set forth and discussed in detail as each contention is answered.

QUESTIONS.

From the contentions of appellants it can be said that four questions are raised by this appeal.

1. Did the Court below err in denying appellants' motion to require "the Government to elect as to which of the two alleged offenses covered by the third count of the information the Government desired to submit to the jury?"

2. Is the evidence sufficient to sustain the verdict of the jury?

3. Did the Court below commit prejudicial error in connection with the testimony of Dr. C. E. Von Hoover and other evidence?

4. Did the Court below err in its instructions to the jury?

ARGUMENT.

THE THIRD COUNT OF THE INFORMATION ALLEGES ONLY ONE OFFENSE.

The third count of the information charges that appellants introduced and delivered for introduction into interstate commerce a certain drug misbranded in two particulars.

(1) In that the statements appearing on the jar label and in the circular represented and suggested that the drug would be efficacious in the treatment of hemorrhoids and piles, whereas in truth and in fact, said drug would not be efficacious in the treatment of hemorrhoids and piles.

(2) In that it was in package form and its label did not bear an accurate statement of the quantity of the contents in terms of weight or measure.

The provisions of the Federal Food, Drug and Cosmetic Act on which this count is predicated are found in Title 21 USCA, Sections 331(a), 333(a) and (b) and 352(a) and (b)(2) and provide as follows:

Section 331:

"The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is misbranded."

Section 333(a):

"Any person who violates any of the provisions of Section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine;

(b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 301, *with intent to defraud or mislead,* the penalty shall be imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine." (Italics supplied.)

Subsection (b) is quoted here because it is apparent from a reading thereof that intent is not a necessary element of proof under subsection (a), and that when an intent to defraud or mislead is charged it must be by indictment since the maximum penalty is three years. Here we have an information under subsection (a).

Section 352:

"A drug or device shall be deemed to be misbranded:

(a) If its label is false or misleading in *any particular;*

(b) If in package form unless it bears a label containing * * * (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count; Provided, That under clause (2) of this paragraph reasonable variation shall be permitted, and exemption as to small packages shall be established, by regulation prescribed by the Secretary". (Italics supplied.)

In this connection it is to be observed that the word "package" means the immediate container of the article which is intended for use or consumption by the public.

McDermott v. State of Wisconsin, 228 U. S. 115.

Appellants' objection to the third count of the information is predicated upon the proposition that each type of misbranding enumerated in Section 352 quoted above constitutes a separate offense. Thus, where goods are shipped in interstate commerce, which are misbranded in only one of the ways specified in that section, only one offense has been committed. But where goods are misbranded in a number of specified ways, although there is but one shipment, as many offenses are committed as there are different types of misbranding. The sophistry of this construction appears evident in view of the position that the single substantive offense is the interstate shipment of

adulterated or misbranded goods. Section 352 merely enumerates the various ways in which an interstate shipment of goods may be deemed misbranded. Whether more than one offense had been committed does not depend upon the number of ways in which a particular article has been misbranded, but rather upon whether more than one shipment into interstate commerce has been made of such misbranded article. In

Weeks v. United States, 245 U. S. 618,

it was held that it was not the several kinds of misbranding that was made unlawful under Section 8 of the Food and Drugs Act of 1906, but the shipment or delivery for shipment from one state to another of the misbranded article.

It is a recognized rule of criminal pleading that a count is not duplicitous that enumerates different means adopted or things done to accomplish the offense. Thus, in

United States v. Swift, 188 Fed. 92 (D. C., N. D. Ill. 1911),

an indictment charging a combination in restraint of interstate commerce in violation of the Anti-Trust Act was not bad for duplicity because it charged and enumerated different means adopted or different things done to accomplish the object of the combination. In its opinion the Court said:

> "It is urged also that the first and second counts of indictment No. 4,509 are bad for duplicity, because they charge a combination in restraint of trade in the purchase of livestock, and also

> in the sale of fresh meat. The objection is not sound. The crime charged is a combination in restraint of trade. Such a combination may design to accomplish its object in many different ways, and the enumeration of the various means adopted does not render the indictment bad for duplicity. *Duplicity in an indictment means the charging of more than one offense, not the charging of a single offense committed in more than one way. Duplicity may be applied only to the result charged, and not to the method of its attainment.*" (Italics supplied.)

Similarly, in the case of

> *United States v. B. Goedde and Co.*, 40 Fed. Supp. 523 (D. C., E. D. Ill., 1941),

it was held that an indictment for conspiracy was not duplicitous because it alleged different means of accomplishing such purpose. In its opinion the Court stated:

> "I do not accept the suggestion that several separate and distinct conspiracies are charged. An indictment is not duplicitous because it alleges different means of accomplishing the purpose. Duplicity arises from charging more than one offense, not from charging a single offense committed in more than one way, *Swift & Co. v. United States,* * * * or from pleading different acts, if they contribute to the ultimate, charged offense. * * * The test for duplicity must be applied only to the result charged and not to averments of various methods of its attainment."

The Federal Food, Drug, and Cosmetic Act does not contain any expression or implication of Con-

gressional intent to create as many distinct and separate offenses or crimes as there are diverse forms of adulteration or misbranding. The definitions in the Act of adulteration and misbranding are not definitions of offenses or crimes against the United States but they are mere descriptions, designations, or specifications of the character of foods and drugs which a person may not ship in interstate commerce without thereby violating the single prohibition of the Act against their shipment and thereby commit an offense against the United States. There is nothing in the Act to warrant the conclusion that if a single article of drugs once shipped or once delivered for shipment was misbranded in two or more respects, the Courts should treat such article as twice (or more often) shipped and the person who shipped the article as having incurred violations for two or more separate and distinct offenses and subject to two or more times the penalty.

Where Congress intended two or more offenses by a single transaction it explicitly so stated.

See

Ebeling v. Morgan, 237 U. S. 625,

where the indictment was brought under a statute which made the cutting and opening of each mail sack a distinct and separate offense.

Furthermore it is a well-settled rule of criminal pleading that, where an offense against a criminal statute may be committed in one or more of several ways, the indictment or information may, in a single

count, charge its commission in any or all of the ways specified in the statute.

See:

31 *C. J.* 764;
22 *Cyc.* 380;
Shepherd v. United States (CCA-9), 236 Fed. 73;
Turner v. United States (CCA-D.C.), 16 F. (2d) 535;
Simpson v. United States (CCA-9), 299 Fed. 940.

In

Crain v. United States, 162 U. S. 625,

the Supreme Court stated that it "perceives no reason why the doing of the prohibited thing in each and all of the prohibited modes, may not be charged in one count".

Appellants' argument assumes, without indicating how or in what manner, that count three recites two separate and distinct offenses and then goes on to cite cases condemning this practice.

From the authorities cited by appellee it should be perfectly obvious that but one offense is alleged in count three and that there is therefore no merit to appellants' contention that count three is duplicitous.

Furthermore the question whether the prosecution should be compelled to elect came late in the trial and was a matter purely within the discretion of the trial Court.

Guy v. United States, 107 F. (2d) 288, 291.

THE EVIDENCE IS SUFFICIENT TO WARRANT A CONVICTION ON ALL THREE COUNTS OF THE INFORMATION.

Appellants throughout their brief stress the alleged failure of the Government to prove that the drugs in question are not efficacious in the treatment of *psoriasis* and seem to forget that all the Government need do is prove that the drugs in question are misbranded in *any particular* (not every particular).

Counts one and two are predicated upon false and misleading claims that the drugs described in said counts, when used individually or conjunctively, "would be efficacious in the treatment of eczema, psoriasis, acne, ringworm, athlete's foot, burns, cuts, poison ivy and varicose ulcers; would act on surface skin irritations as a stimulant and would increase circulation and aid in healing; would be efficacious to inhibit the spreading of skin irritations and to restore the normal skin surface; and would be efficacious to kill or check disease germs".

The false and misleading claims on count three have already been stated.

We will assume for purposes of argument that the drugs described in the first two counts are efficacious in the treatment of psoriasis.

But, are they efficacious in the treatment of acne?

Are they efficacious in the treatment of eczema?

Are they efficacious in the treatment of varicose ulcers?

Will the capsules (Count II) taken internally prove efficacious in the treatment of athlete's foot?

Will they restore the normal skin surface?

Will they kill or check disease germs?

We will further assume for purposes of argument that the ointment described in Count III is efficacious in the treatment of hemorrhoids and piles.

But, does the label on the package bear an accurate statement of the quantity of the contents in terms of weight or measure?

The statute above quoted (Section 352 (a)) says a drug shall be deemed to be misbranded if its labeling is false or misleading in *any particular.*

It therefore follows that if the evidence shows beyond a reasonable doubt that the drugs herein involved *will not do any one* of the things just stated in question form, appellants are guilty.

This requires a detailed review of the evidence.

The Interstate Shipment.

At the outset appellants stipulated that they, *the defendants,* did introduce and deliver for introduction into interstate commerce the drugs alleged to have been so introduced into interstate commerce in the three counts of the information (Tr. 15-17).

Witnesses Buell and Yakowitz.

Witness Buell, after being eminently qualified as a chemist of fifteen years experience, testified that the Colusa Natural Oil and the oil in the capsules is a crude petroleum oil which does not contain sulphonated hydrocarbons, has no alkaline action, is not

a natural alkaline oil, is not a sulphonated solution, has no camphor or turpentine and contains .75 of 1 per cent of total sulphur, and that the ointment described in count III is a light brown ointment consisting essentially of zinc oxide, benzocaine, camphor, menthol, crude oil and lanolin or beeswax (Tr. 20). He also testified that there were no iodine compounds (Tr. 19) or ichthyol (Tr. 33) present in the drug and that it had no astringent effect at all (Tr. 33).

This testimony was corroborated by that of Mr. Yakowitz, another equally qualified chemist, who supervised the work of Buell (Tr. 33-39).

Appellants object to this testimony, not because it is scientifically incorrect, for they could not produce a single chemist, even from Texas, who could or would testify otherwise, but because, as the Court and jury had every right to infer, it proved that their chemical claims as to these products were false.

This testimony conclusively proves that the following claims of appellants *are false:*

1. That the drugs contain sulphonated hydrocarbons (a substance found in ichthyol) (Tr. 20).

2. That it is a natural alkaline oil (Tr. 23).

3. That it is an astringent (Tr. 23).

4. That it has an alkalizing action (Tr. 23).

5. That it carries 4% iodine, 3% ichthyol, and a trace of camphor and turpentine (Tr. 27).

Appellants object to the fact that the tests to determine the presence of camphor and turpentine were

made by the sense of smell, yet as the uncontradicted testimony of Mr. Buell shows this is the *best* available test.

Appellants also object to the fact that the oil was not tested by the process of fractional distillation employed in the petroleum industry. This objection is without merit and if appellants felt that such a test would prove the Government's chemist wrong, they had every opportunity to put their own chemists on the stand to contradict them.

In short, the testimony of the Government chemists laid the foundation upon which to predicate the questions propounded to the Government's medical witnesses and established that the oil in question did not possess chemical properties (such as those found in ichthyol) upon which beneficial therapeutic claims could be based.

Dr. Anna Mix.

Doctor Anna Mix, a chemist for the Food and Drug Administration since 1918, testified that her duties consist in the examination of food and drugs to determine their radioactivity, that she has made hundreds of such tests, and that her examination of Colusa Natural Oil disclosed no evidence of radium emanations or radioactivity (Tr. 40).

Appellants would have us believe that her testimony is immaterial and has no place in this case, yet the labeling (newspaper mat) claims that Colusa Natural Oil contains radium emanations which are "taken up in the blood stream, and as quickly as

lightning, goes to all parts of the body *where it kills or checks disease germs"* (Tr. 27). This is an extravagant claim without the slightest foundation, and is the basis of the Government's charge that the oil is misbranded because it *will not check or kill disease germs.*

Mary Smith and Nicholas Leone.

Mary Smith and Nicholas Leone, eminently qualified bacteriologists, as their record of training and experience shows (Tr. 42, 45, 47), testified that they tested Colusa Natural Oil to determine its germicidal, antiseptic and inhibitory properties and found *none* (Tr. 42, 45).

They made forty tests, which were standard laboratory tests made by the Food and Drug Administration, of materials claimed to be antiseptic or germicidal (Tr. 42, 43, 46, 48). True, they used only two organisms, the typhoid organism and the staphylococcus aureus (common pus-forming organism), which is an organism that has a standard resistance. These tests established that the oil *will not kill or check disease germs,* not necessarily the germ that causes psoriasis, if a germ does cause this disease. The claim of appellants is that the oil will kill or check disease germs and since no specific disease germ is named, the statement in the labeling constitutes a claim that the oil will (because of the radium emanations) kill or check disease germs generally. This testimony of Mary Smith and Nicholas Leone is uncontradicted (no bacteriologist took the stand for ap-

pellants) and conclusively proves the labeling false in one very definite particular,—*and alone calls for a verdict of guilty under the Federal Food, Drug and Cosmetic Act.*

Dr. Maurice K. Tainter.

Dr. Maurice K. Tainter testified that he is a professor of pharmacology at Standard University and a physician and surgeon, graduated from Stanford Medical School in 1925, is a member of all local, national and international societies relating to his profession and has published many articles here and abroad dealing with new drugs and their uses. (Tr. 50-51.) He further testified that he is familiar with petroleum oils as a pharmacologist and that it is one of the compounds the use of which he teaches medical students and doctors. (Tr. 51.) He further testified that Colusa Natural Oil is not an astringent, has no iodine, no radioactivity or radium emanation, is not irritating to the skin, has no camphor or menthol, has no smell of turpentine (Tr. 51) and has no distinctive properties or materials which could be recognized as having medicinal power. (Tr. 53-54.)

He further testified that the oil has no alkalizing action, no healing qualities, would not be efficacious in the treatment of psoriasis, eczema, acne, athlete's foot, poison ivy, or varicose ulcers, is undesirable for burns and cuts, will not act as a skin stimulant, will not increase the circulation of blood, and will not restore the skin surface. (Tr. 54.) With relation to radium emanations, the transcript of record on page 54 shows as follows:

> "The statement that 'the emanation is taken up in the blood and as quick as lightning, goes to all parts of the body where it kills or checks the disease germs' is not true. Any amount of radiation which would be sufficient to kill disease germs will be enough to kill the body. The tissues of the body are more sensitive to radiation than are the germs."

With relation to ointment mentioned in count three, he testified as follows:

> "The salve or ointment would not be a competent or good treatment for hemorrhoids. It might be palliative in relieving itching; it might help the itching temporarily, but would not cure the condition. The benzocaine would relieve the itching." (Tr. 55.)

On cross-examination Dr. Tainter testified that he was not a dermatologist (Tr. 59-60), had never treated the skin diseases mentioned in the information and had made no clinical test, excepting an animal test with rabbits and a test to his person from which he determined that Colusa Oil had no irritating effect on the delicate membranes of the eyes of rabbits or on his own skin. (Tr. 60.)

This testimony of Dr. Tainter clearly shows that Colusa Oil will not act on surface skin irritations as a stimulant, and standing alone proves the oil to be false in *another particular* which justifies a verdict of guilty. His testimony also proves that the oil will not kill or check disease germs from radium emanation.

So we repeat, even if the oil is efficacious in the treatment of psoriasis, which we do not admit, we have up to this point introduced conclusive evidence that its claims are false in at least *two particulars.*

Dr. James W. Morgan.

Dr. James W. Morgan testified that he is a surgeon of the rectum and colon and a specialist in that field, is a graduate of the University of Pennsylvania, has taken postgraduate work in New York and London, is a member of recognized medical societies and has written articles for medical journals. (Tr. 65.) He testified that in his opinion (given the ingredients of Colusa Hemorrhoid Ointment as established by the chemists) the ointment would not be beneficial in the treatment of hemorrhoids. (Tr. 66.) He admitted, on cross-examination, that he had never seen or used the Colusa Hemorrhoid Ointment, and that his opinion was hypothetical. (Tr. 66.) He further admitted that specialists in his field have varying views (Tr. 67), and on re-direct, he stated:

> "I think this ointment from this jar would do more harm than good in the treatment of hemorrhoids; it might relieve temporarily some of the symptoms. Zinc oxide ointment as such is always irritating to the perianal skin and should never be used."

This testimony, if believed by the jury, would in and of itself justify a verdict of guilty on the third count on the alleged claims that the ointment is efficacious in the treatment of hemorrhoids and piles. *However the second claim of misbranding on the*

third count, to-wit, that its label did not bear a statement of the quantity of the contents in terms of weight or measure, is clearly and conclusively proven and permits but one, and only one verdict—guilty.

Dr. Harry John Templeton.

Dr. Harry John Templeton, a specialist in dermatology and syphilology, with an eminent background of training and experience (Tr. 68-69), testified that in his opinion Colusa Natural Oil (given its ingredients) would not be efficacious in the treatment of acne, psoriasis, athlete's foot, ringworm or eczema. In fact he voiced the opinion that it would be harmful in the treatment of acne, poison oak and poison ivy. (Tr. 69.) True, he testified on cross-examination that he never used the oil in his practice and made no clinical tests with it. True, he also stated that "Psoriasis is a very difficult disease and I know no cure for it". (Tr. 70.) The effort of appellants to limit the value of Dr. Templeton's testimony to psoriasis, clearly shows the limited scope they are endeavoring to give the evidence in this case. But they cannot escape the doctor's conclusions as to acne, athlete's foot, poison ivy, ringworm and eczema, and if the jury believes the oil not to be efficacious for *any one of these,* then the Government has established its case, for we repeat, a drug is misbranded if it is *false or misleading in any particular.*

Dr. George V. Kolchar.

Dr. George V. Kolchar testified that he is a physician specializing in dermatology and syphilology, and

has acted as clinical instructor in these two subjects at Stanford University since 1934. The evidence discloses that he too is a man of eminent training and experience. (Tr. 70.) He testified that in his opinion Colusa Oil would not be efficacious in the treatment of eczema, acne, poison ivy, ringworm, athlete's foot, psoriasis, and varicose ulcers. His testimony relative to eczema and acne discloses:

> "Eczema comes in more than one form and the form of eczema would very definitely determine the character of the treatment or medication. You cannot have one specific medication that is good for treatment of eczema. The determination what should be used in the treatment of eczema depends upon a knowledge of the particular character of the eczema involved and that calls for a diagnosis by a skin specialist.
>
> I am familiar with the composition of Colusa Natural Oil as recited by you. Bearing in mind its composition, as related by you, it is my opinion that the application of this oil would not be efficacious in the treatment of eczema; I think it would have a deleterious effect and an aggravating effect on acne; it would make it worse * * *." (Tr. 71.)

He further testified that Colusa Oil would not act as a stimulant on the skin, would not inhibit the spread of skin irritation and would not restore normal skin surface. (This fact corroborated by appellants' own witness, Dr. Vincent.) He also testified that radium emanations are not used in the treatment of skin diseases and said that it is not true that "radium emanation is accepted as harmoniously in

the body as is sunlight by the withering plant" and with relation to radium emanations said:

> "Radium is subject to regulation and control; you must have the proper dosage applied in the proper manner; radium is an extremely dangerous element; it is stored in the bones; it destroys blood cells; it destroys certain vital glandular tissue; its improper use will lead to certain diseases of the blood which are fatal. The deposition of radium in the bone in the form of salts will lead to necrosis, by which I mean, the killing of the cells of the bone." (Tr. 73.)

True he admitted that he does not profess to be an expert on psoriasis, however this admission does not detract from his testimony relative to the efficacy of the oil in the treatment of eczema, acne, poison ivy, ringworm, athlete's foot and varicose ulcers.

Dr. Frederick A. Fender, an eminently qualified surgeon and clinical instructor in surgery at Stanford Medical School, testified that Colusa Oil would not be efficacious in the treatment of varicose ulcers whether applied externally or taken internally. He further testified that in his opinion the oil would not be good in the treatment of burns or cuts. He further testified that the ointment (count III) would not shorten the course of hemorrhoids, nor cure or improve them. His testimony, standing alone, is sufficient to warrant a conviction for false claims as to varicose ulcers on counts I and II and false claims as to hemorrhoids on count III. (Tr. 75-77.)

After reading into the record the contents of Government's Exhibit No. 6, appellee rested.

THE DEFENSE EVIDENCE.

The defense called up as its witnesses, satisfied users of the products in question.

Frank Fazio testified that he received splendid results from the use of Colusa Oil applied externally in the treatment of *psoriasis.* (Tr. 77-79.)

Dr. William G. Woodman, an osteopath, testified that while he is not a dermatologist and does not treat skin conditions and refused to treat *psoriasis,* he had successfully treated some patients with Colusa Oil and that he had not treated a case where he received unfavorable results. He admitted using a quartz light in connection with the treatment of one Mathew. (Tr. 80-82 and 85.)

Donald R. Crawford testified that he had *poison oak,* was given shots by a physician which brought about a reaction and that thereafter he used Colusa Oil which gave relief and enabled him to heal up this condition within a week to ten days. (Tr. 83-85.)

Henry N. Stabeck testified that he treated *stomach ulcers* successfully with Colusa Oil and treated *athlete's foot* successfully by the external application of Colusa Oil, but in that connection said that *he cleaned his foot every day* and rubbed the oil on both morning and night. (Tr. 85-87.)

Mrs. Josie Alice Mead testified that she had suffered from *psoriasis* for many years and had been unsuccessfully treated by various skin specialists, including Dr. Kolchar, the Government's witness, and that by the use of Colusa Oil and Colusa Oil capsules,

she was able to effect an almost complete cure in four weeks. (Tr. 87-89.)

Mrs. Teresa L. Loughran, aged sixty-two, testified that she successfully used Colusa Oil in the treatment of *varicose ulcers,* but admitted that because of a weak heart she had been bedridden and under a rest cure and taking digitalis for seventeen months. (Tr. 89-90.)

Mrs. Agatha Devlin Harless testified that she had *eczema* and had been treated therefor by several doctors including Dr. Kolchar, and that she received no beneficial results until she used Colusa Oil. (Tr. 91.)

Mrs. Rena Gerlach testified that she suffered from a skin disease, the nature of which she did not know, and that after unsuccessfully treating with doctors and other remedies, she finally used Colusa Oil, which cured her in three weeks. (Tr. 92.)

Howard Everett, aged seventy-five, testified that the ointment covered by count III gave him greater relief than any other product with which he treated for *hemorrhoids.* However he did not claim to be cured of his hemorrhoids. (Tr. 93-95.)

Miss Evelyn Marie Costello testified that she had a skin disease known as *eczema,* for which she was treated at Mayo Clinic and with several doctors without effecting a cure, and that several months before the trial she began using Colusa Oil, which has helped her very much and given her relief. (Tr. 109-110.)

Marco Sablich testified that Colusa Oil gave him more relief for *psoriasis* in five weeks than he got in fifteen years treatment with doctors. (Tr. 110-111.)

Miss Adele Davis testified that she suffered from *eczema* for five years and used many remedies and consulted doctors without beneficial results. She further testified that she used Colusa Oil which gave her immediate relief and said "Really, to me it was magic". (Tr. 111-112.)

Dr. Gilbert Mead, a chiropractor, testified he suffered a severe burn two weeks before the trial, used Colusa Oil, and that within half a minute the stinging ceased. (Tr. 112.)

Mrs. Opal Cameron testified that she had *eczema* off and on from the time she was a youngster and that she got relief from Colusa Oil, which cleared up her condition. (Tr. 157-158.)

Mrs. Wilma Welch testified she had a mild affliction of *althlete's foot* and that she obtained instant relief by the use of Colusa Oil. (Tr. 158.)

Arthur W. Scott, a former employee of appellant Colgrove and a welder in the shipyards, testified that Colusa Oil was beneficially used by him in treating a severe burn and a cut. (Tr. 158-160.)

The three remaining witnesses for appellants were Dr. W. T. S. Vincent, Dr. C. E. Von Hoover and appellant Walker Colgrove.

Dr. W. T. S. Vincent, seventy-eight years of age, a practicing physician from Texas, testified that he took preliminary work from his father, then attended the University of Cincinnati for two years, graduating in 1889 (Tr. 96); that he took no post graduate work and is not a member of any medical societies (Tr. 102); and that he is "a specialist in blood, geni-

tal, urinary and dermatology" and operates a clinic in Houston under the name of "Wage Earners' Clinic", formerly known as "Dollar Medical Clinic". (Tr. 103.)

In the course of his fifty-two years practice he treated practically all skin diseases and has used Colusa Natural Oil in the treatment of his patients hundreds of times. (Tr. 97.) He described his successful treatment by the use of Colusa Natural Oil of one Carl Alsobrook and one Dalkins, both terribly afflicted with *psoriasis.* (Tr. 97-99.) He also claimed successful use of this oil in the treatment of *athlete's foot, acne and varicose ulcers.* (Tr. 99.) He stated that Colusa Natural Oil quickly mitigated the itching and pain incident to the skin diseases about which he testified (Tr. 100) and that it had a very fine penetrating effect into the skin and accomplishes restoration of new skin. (Tr. 100.) His statement "I know it is the best treatment I have ever used" (Tr. 100) was an expressed firm conviction of the efficacy of the oil in the treatment of *psoriasis* and not of all the various and assorted cases of skin diseases as claimed by appellants. He also found Colusa Natural Oil efficacious in healing varicose ulcers and found the Colusa Ointment efficacious *in relieving the discomfort and irritations of hemorrhoids,* but made no claim that it cures hemorrhoids. He further said:

> "It is my opinion that Colusa Natural Oil is efficacious to relieve discomfort and pain incident to these skin diseases referred to in the information, and it will inhibit the spread of skin irritations and restore the normal skin surface. It is

my further opinion that this oil acts on the surface of skin irritations as a stimulant and increases circulation and aids in healing." (Tr. 102.)

As for his cross-examination appellants say:

"The witness was subjected to a lengthy cross-examination, but none of his testimony with respect to these various cases treated by him with Colusa Natural Oil was in any manner impeached or weakened. To the contrary, he demonstrated, on this examination, a wide knowledge of these skin diseases and reemphasized the effectiveness of these Colusa products in the treatment of such diseases." (Appellants' Opening Brief, p. 21.)

With this conclusion we cannot agree, as an analysis of his cross-examination will show. On direct examination he spoke of the homeopathic and allopathic schools of medicine and the great differences between the two (Tr. 100-101), yet on cross-examination he admitted that he had never studied anything about homeopathy (Tr. 105). He said that Colusa Natural Oil had ichthyol content and that he knew this by its odor (Tr. 106), yet he admitted he had no chemical analysis of Colusa Oil made (Tr. 105), and his testimony in this regard was directly in conflict with that of the Government chemists, who chemically analyzed the oil and found *no* ichthyol present. Certainly they, as chemists, are better qualified to testify as to its ichthyol content. This bit of testimony clearly evidenced the readiness of Dr. Vincent to testify favorably to petitioner, even when his testimony was without scientific basis or foundation. He admitted treat-

ing one Guidry for acne (Tr. 106) and his testimony with regard to this person is interesting and enlightening. He testified as follows:

"Q. In the case of Guidry, you prescribed a diet, because you thought that condition was necessary to his treatment of acne?

A. Yes.

Q. What was the medication you prescribed?

A. Nothing except cleansing.

Q. What other treatment?

A. No other treatment.

Q. None, whatsoever?

A. No.

Q. You are positive?

A. I don't remember giving him any other treatment." (Tr. 106-107.)

As against this we have the testimony of Guidry:

"I reside in Houston, Texas; I took treatment for acne; I visited Dr. Vincent, who has been a witness here.

Mr. Zirpoli. Q. How long did you go to him and were you in his care with relation to treatment for acne?

A. Well, about eight or ten months, I imagine; something like that.

Q. Did he at any time use Colusa Oil in the treatment of you?

A. Yes, sir.

Q. And in treating you with Colusa Oil did he do anything else or prescribe anything else?

A. What do you mean, the treatment I was given?

Q. Yes.

A. I was given something else besides that.

Q. What did he do besides give you Colusa Oil at that time?

A. He put me on a diet and he used shots.

Q. Injections?

A. Injections.

Q. In your bloodstream?

A. Yes, sir.

Q. In other words, where? In your arm?

A. In my arm and back.

Q. Did you observe any change in your condition of acne from the use of Colusa Oil?

A. No, sir.

Q. Did you observe any change for the better?

A. I can't see where it helped me." (Tr. 264-265.)

Guidry then went on to testify that a good while after he had seen Dr. Vincent he learned that by watching his diet his condition improved and that he got beneficial results from one Dr. Gandy, who gave him radium treatments and placed him on a strict diet. (Tr. 265-266.)

Dr. Vincent further said with relation to Guidry:

"Mr. Zirpoli. Q. Doctor, you say that he has those scars and he has those *id*entations as a result of this acne vulgaris?

A. He has.

Q. Is that correct?

A. It is.

Q. In other words, Colusa Oil, then, did not restore the natural skin surface over where the scars were and the indentations were, did it?

A. I would like to answer that in some way besides Yes and No.

Mr. Gleason. Go ahead; you can answer.

Mr. Zirpoli. Q. I know; *but did or did not it restore the natural skin surface?*

A. *It couldn't do it, nor any other remedy."* (Tr. 261.)

This last admission of the Doctor not only weakened his testimony but corroborates the testimony of the Government's doctors and *conclusively* proves that Colusa Natural Oil *will not restore the natural skin surface.* The claim of appellants that Colusa Natural Oil will restore the normal skin surface is therefore *false* and *alone* justifies a verdict of guilty of misbranding (in any particular) on counts I and II.

Dr. C. E. Von Hoover. In view of appellants' contention that the trial Court committed prejudicial errors in connection with the testimony of this witness, that testimony is set forth in detail in a subsequent portion of this brief wherein these alleged errors are discussed. (See pp. 36-59, infra.) However, this testimony should be considered together with the evidence heretofore stated in passing upon the sufficiency of the evidence to warrant a conviction.

Chester Walker Colgrove. In view of appellants' contention that the trial Court committed prejudicial errors in connection with the testimony of this witness, that testimony is set forth in detail in a subsequent portion of this brief wherein these alleged errors are discussed (see pp. 65-73, infra), and should be considered together with the evidence heretofore stated in passing upon the sufficiency of the evidence to warrant a conviction.

REBUTTAL EVIDENCE.

Homer H. Baumgartner testified that appellee's Exhibit "O" in evidence is a photograph of his hands and his signature. He related that he went to see Mr. Colgrove at the suggestion of his dentist and that by using Colusa Natural Oil in conjunction with an electric lamp for twelve days the condition of his hands improved to the extent shown by the second photograph of his hands, appellee's Exhibit "O". However, he testified that at the time of the second photo the palms of his hands were still sore and that the condition returned until at Easter time they were just like a piece of beefsteak. He further testified that his hands are now better and that he has not treated with Colusa Oil since the first treatments during the twelve day period covered by the photograph. (Appellee's Exhibit "O".) True, on cross-examination, he testified as follows:

> "Dr. Lilliquist gave me the lamp the next morning after I saw Colgrove; the oil and the lamp did the work, relieving me for the time being from the itching and torment; I then had had this disease for sixteen years; I previously had gone to doctors, but they had not cured this disease; they did not give me as much relief as I got from Colusa Oil; with the oil and lamp together I got relief for a short period; I never tried the lamp alone before nor since." (Tr. 263.)

However, the significant thing about his testimony is the fact that the declarations contained in the affidavit prepared by Mr. Colgrove and executed by him to the effect that

> "Colusa Natural Oil—used externally—and Colusa Natural Oil Capsules—taken internally—are the only treatments I used in clearing up this terrible condition in Twelve Days as pictured above.
>
> (Signed) HOMER H. BAUMGARTNER."
>
> (Tr. 24.)

are not true. He did not take the capsules internally and he did use *an electric lamp.*

Amos Guidry. The testimony of this witness has already been reviewed in the observations heretofore made of the testimony of Dr. Vincent. (See pp. 30-32, supra.) Apparently the only treatment that benefited this witness was his diet and he concluded his testimony by saying that the condition of his face was *worse* in appearance when he *left* Dr. Vincent than it was at the time of his appearance as a witness. (Tr. 266.)

Harry Y. Anderson testified that he used Colusa Natural Oil for eczema for about a week, applying it twelve times, and observed no improvement, that it did not stop the itching, that he had this condition for two weeks before using the oil and the condition went away in about three weeks after using a home remedy of sulphur and lard. (Tr. 266-267.)

Mrs. Mary Ellen Hosford. This witness testified that she used Colusa Oil in July and August of 1941 for psoriasis on her legs and arms without beneficial results. She first applied it morning and night, but it made her legs too sore and she was forced to reduce its use to once a day, and finally to once every two

or three days for about a month and a half until she had used practically all of the bottle. She then went to the druggist, told him it did not help her at all and got her money back. (Tr. 267-269.)

William Milne, who had varicose ulcers for about twenty-five years and tried various doctors and many remedies, tried Colusa Natural Oil for about two and a half weeks without improvement. (Tr. 270-271.)

The above, with certain unimportant exceptions, constitutes the evidence introduced by both appellee and appellants.

Does that evidence establish the guilt of appellants beyond a reasonable doubt on all three counts of the information?

The Federal Food, Drug and Cosmetic Act (21 USCA, Section 352(a)) provides that a drug is misbranded "if its labeling is false or misleading in *any particular*" (not *every* particular).

No effort will be made to review all the particulars in which the drugs involved were claimed to be misbranded.

As for count one, the evidence is uncontradicted that Colusa Natural Oil will not restore the natural skin surface and that it will not kill or check disease germs. Proof of either of these calls for a verdict of guilty on this count.

As for count two, the evidence conclusively shows that Colusa Natural Oil capsules taken by mouth are not efficacious in the treatment of athlete's foot

(or for that matter, any of the other skin diseases), will not restore the natural skin surface, and will not kill or check disease germs. Again proof of any one of these calls for a verdict of guilty.

As for count three, a simple reading of the label discloses that it does not contain "an accurate statement of the quantity of the contents in terms of weight, measure or numerical count". (21 USCA, Section 352(b)(2).)

In the face of the clear and explicit language of the Federal Food, Drug and Cosmetic Act, that a drug is misbranded if its labeling is false or misleading in any particular and is misbranded if in package form unless its labeling bears an accurate statement of the quantity of the contents in terms of weight, measure or numerical count, citation of authorities sustaining a verdict of guilty on the evidence in this case on all three counts is unnecessary.

In concluding on the sufficiency of the evidence to sustain the verdict we invite the Court's attention to the accepted rule that the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

Glasser v. United States, 115 U. S. 60, 81.

NO PREJUDICIAL ERROR WAS COMMITTED BY THE TRIAL COURT IN CONNECTION WITH THE TESTIMONY OF DR. C. E. VON HOOVER OR THE OTHER WITNESSES.

Dr. C. E. Von Hoover testified as to his studies and qualifications as a Doctor of Science in Pharmacology

and Pharmaceutical Chemistry and stated that he is the director of a clinical testing agency in San Antonio, Texas, that is partially owned by himself and the clinical staff, *who do all the actual application of physiological tests.* (Tr. 113.) He further testified that he used the Pharmacopoeia of the United States in his studies (Tr. 113) and in that connection his testimony further shows:

"Mr. Gleason. Q. Let me digress for one moment: Do the men in the pharmaceutical profession have what I term a dictionary? Mr. Doyle terms it a bible.

A. We have a Pharmacopoeia No. 11; and we have the Homeopathic Pharmacopoeia.

Q. What are those Pharmacopoeiae?

A. They are the laws of dosages for internal and external medicines of every nature." (Tr. 115.)

He further said:

"In my clinic I have the *medical clinician, the M. D., the one that diagnoses, the one that prescribes, the one that applies or gives the particular medicine.* Dr. Beal is one of my assistants; he is acting superintendent and U. S. Public Health Officer. He is Assistant United States Surgeon, and in charge of the various public health matters, including immigration matters, in San Antonio. In addition to Dr. Beal, I have Dr. A. R. Burchelmann, M. D., he is the examiner and former Health Officer of San Antonio, and past Trustee of the American Medical Society. I also have Major Burby, retired Trustee of the American Veterinary Association, who is my veterinary consultor in the small animal practice." (Tr. 116.)

The following is a detailed statement of the testimony of Dr. Von Hoover relative to certain tests, observations and conclusions made by him in the use of Colusa Natural Oil:

"Yes, we made clinical tests in our laboratory and clinic of Colusa Natural Oil and Colusa Hemorrhoid Ointment.

Q. Without going into details, I want to find out, first, what you did generally in order to test this remedy.

Mr. Zirpoli. You will have to bring in the doctors that made the test. You cannot take a man who is not a physician and surgeon, and who is not competent.

Mr. Gleason. This man's business is to test drugs.

I made tests of Colusa Natural Oil as a pharmacologist and I have the reports. I also tested the oil on animals. I am not a veterinarian, but I am a graduate of veterinarian life science.

Q. Did you test the oil on human beings?

A. Yes.

Q. First describe the tests that you made of this oil in its application to animals.

Mr. Zirpoli. I object. He is not qualified to make an application of medication upon animals, or upon humans, and he is not qualified to treat animals or humans.

The Court. Proceed.

Mr. Gleason. Q. Briefly describe, Doctor, the test.

A. We had tests with a——

Mr. Zirpoli. I object again on the ground this man is not competent to testify.

The Court. In the interest of time I will allow it.

A. I tested it with a parasital agency of the product in canine dermatology.

In this canine dermatology, the follicular mange attacks the roots of the hair. We submit the demodectic folliculum to the microscope in a plate. There are five stages, from the egg to the mature bug. We put them under the microscope to see if they are alive; then we immersed them in this oil and put them away in a germ proof place. In an hour or two we bring them back and put them under the microscope. Yes, I personally did all this. The purpose of this is to determine the germicidal agency, and, if any, parasital. Yes, to determine whether or not this oil would apply to the mange condition of a dog, and whether or not it would destroy it. In these tests of Colusa Oil, I personally observed under my microscope that from the egg to the mature bug, these were dead; we tried this on a number of dogs. Yes, this is the practice we follow in testing for Bauer & Black, Goodman, and the rest of our clients.

Q. Now, with respect to the test that you said you made on human beings, tell us what you did with respect to the testing of Colusa Natural Oil on human beings.

Mr. Zirpoli. I submit he is not competent to administer oil to human begins as medication, and this is not proper evidence. It is incompetent, irrelevant, and immaterial. He has no right to treat anyone.

The Court. I will limit it to what he did, himself.

With respect to these tests on human beings, I reported these findings to the clinicians to assure them of the safety; we had psoriasis, athlete's foot and the different types of eczema. A case

record was made out. With the physician we select the patient, and the physician diagnoses the the patient. I am with the physician. He dispenses the oil, a sufficient amount for two or three days and the patient returns to the clinic.

Mr. Zirpoli. Under those circumstances, the doctor is the only competent witness.

The Court. I have limited the testimony and I instruct the jury it is limited to what this witness has done, if anything, himself, in relation to this test, so-called. Proceed.

We procured our patients from the Robert Greene charitable clinic. Yes, I saw the patients, absolutely. I observed their condition. I personally took scrapings of skin from the patients in athlete's foot cases and tested them under the microscope, and if it was a true case of athlete's foot, we used Colusa Oil for treatment.

I first learned of Colusa Oil through a patient at this clinic who had a difficult psoriasis case.

Our clinical testing of Colusa Natural Oil lasted over a period of several months, beginning in April, 1942 and lasting until about June 9th.

Q. In the course of this clinical test, in charity clinics, and in your laboratory, how many cases of psoriasis were tested with Colusa Oil by you?

Mr. Zirpoli. I object to that as incompetent, irrelevant, and immaterial. This man is not competent to testify as to psoriasis. I object to that.

Mr. Gleason. We submit two things: first, this man had to study Materia Medica, and the diseases of the skin, and he is as competent as a practicing physician.

The Court. The testimony shows that he kept the case history. What else did he do? The record is clear on that matter.

A. I personally take the scrapings from the skin and subject them to the microscope and ascertain their constituents. Yes, in the course of these years of study I have told you about I did study skin diseases.

Q. Did you study the literature and existing knowledge of psoriasis and eczema, and all other skin diseases?

A. All doctors of science are very much interested in literature, and we read all the literature on psoriasis.

Mr. Zirpoli. May I ask that go out?

The Court. It may go out.

Mr. Gleason. Is that a part of your training?

A. It is a part of our required course.

Q. After the oil was applied in the clinic, did you observe its effect upon the patient?

A. Yes.

Mr. Zirpoli. I object to his observation of the effect of a medication on a patient. He is not competent to testify to the effect of a medication on a patient.

Mr. Acton. I don't like to argue after your Honor has ruled, but the law is, I think, your Honor, that a man may observe a person, and may know that a person is undergoing a certain type of medication, because he is undergoing it right in his own home, or in his laboratory.

Mr. Gleason. Q. Did you see the Colusa Natural Oil applied to people who had psoriasis in this clinic?

A. Yes.

Mr. Zirpoli. Just a moment, I object to that. He is not competent to testify they had psoriasis.

The Court. Objection sustained.

Mr. Zirpoli. There are methods of proving those things by bringing proper witnesses.

Mr. Gleason. Did you see that ointment, Doctor, applied to people who had skin diseases?

A. Yes.

Mr. Zirpoli. The same objection. He is not competent to testify they had skin ailments.

The Court. I will allow the question and answer to stand. Let us get through with this witness.

I observed one hundred clinical tests from the Burchelmann Clinic and twenty-five from the U. S. Public Health by Dr. Beal. We have the clinic and Dr. Beal or Dr. Burchelmann is always present in the clinic all the time. We have but one clinic, a big clinic, where we put the material in, one hundred patients at a time. Dr. Beal, Dr. Burchelmann and myself are all present. We are always in the clinic together.

I remember the case of a Mr. McDonald, 809 South Alto Street, who is a fairly representative case. He had schizo-rubra eczema in his hand for about twenty years; that was treated with Colusa Oil.

Mr. Zirpoli. I object to any testimony with relation to the character of the disease.

Yes, I caused a photograph to be made of this patient's skin trouble. This photograph was then marked Defendants' Exhibit F for identification. This photograph is of the hand of J. R. McDonald; he was treated with Colusa Oil; this photograph was taken before starting treatments.

The witness was then shown another photograph which was marked Defendants' Exhibit G for identification; that photograph shows Mr. Mc-

Donald's hand after completion of treatment with Colusa Oil.

I remember Mrs. A. Nelly of San Antonio, Texas; she was a housewife, seventy years of age, who had a varicose ulcer.

Mr. Zirpoli. I object to all of this testimony, first of all, as hearsay, as to her age, and his conclusion and opinion as to her having a varicose ulcer. He is not competent or qualified to testify to that. It may be the fact, but nevertheless, he is not the proper witness for it.

Mr. Gleason. We submit, if the Court please, the statement that any man who has studied the Materia Medica and who has studied the diseases and taken the necessary and prescribed courses to obtain the degrees this man has, is competent to testify as to whether or not a given condition is a varicose ulcer, or eczema.

The Court. I will allow him to answer with the hope we will get through soon.

A. Mrs. A. Nelly is the varicose ulcer.

The Court. How do you know?

A. Well, from my experience, your Honor, in the laboratory, and as a doctor of science, and from the knowledge I have of Materia Medica, and dermatology and therapeutics, I determine that.

The Court. By observation.

A. By observation, yes sir.

The Court. That is what you base your testimony on?

A. That is what I base my testimony on, yes sir.

The Court. All right, proceed.

Mr. Gleason. May I have this picture marked next in order for identification?

Thereupon the photograph was marked Defendants' Exhibit H for identification.

Mr. Zirpoli. May I ask one other foundational question?

The Court. You may.

Mr. Zirpoli. You are not a pathologist, are you?

A. No, sir, I am not a pathologist.

Mr. Zirpoli. Now I object to his conclusion as to the woman having a varicose ulcer on that further ground.

The Court. I will sustain the objection and instruct the jury to disregard the testimony.

Mr. Gleason. May we have an exception?

The Court. You may have an exception.

Mr. Gleason. In any event, Mrs. Nelly was suffering from a skin ailment?

A. Yes.

I am now looking at Defendants' Exhibit H for identification which I recognize as a photograph of Mrs. Nelly's leg with this invasion in it, if you want to call it that, if I am not permitted to call it a varicose ulcer; she was treated with Colusa Oil in the course of my clinical testing, which I previously have described. I personally observed and watched the case, and on the seventeenth day she returned to the clinic and I caused another photograph to be made to show the progress.

At this point, Mr. Gleason asked another photograph be marked Defendants' Exhibit I for identification. This photograph, Defendants' Exhibit I for identification, shows the right foot and part of the leg of Mrs. Nelly, taken seventeen days after her first admission and treatment in the clinic.

Thereupon, Defendants' Exhibits H and I for identification were admitted, in evidence, over objection, as Defendants' Exhibits H and I.

Thereupon, Defendants' Exhibits F and G for identification were offered in evidence and were admitted, over objection, as Defendants' Exhibits F and G.

Yes, approximately one hundred twenty-five cases of skin diseases of various kinds were treated in this clinical testing laboratory, and Colusa Oil was used in these treatments.

Q. Were any cases of psoriasis treated in that clinical testing laboratory?

Mr. Zirpoli. I object to that; he is not competent to testify as to any cases of psoriasis, or their treatment.

The Court. Objection sustained.

I have had occasion in the course of my professional training at various colleges and in my practice to study skin diseases, and particularly psoriasis; I have studied dermatology; I have had occasion to study the eczema family of which there are forty types. I have studied varicose ulcers. As a result of my training in dermatology, and as a result of clinical testing work in my professional practice, I can identify these various diseases when I see them.

Q. You tested, as I remember, one hundred twenty-five cases. How many cases of psoriasis were included in that group?

Mr. Zirpoli. I object to that, your Honor, again, as this man is not competent to testify to that.

The Court. If he knows, he may answer.

A. Twenty.

Mr. Gleason. How many cases of eczema, approximately?

Mr. Zirpoli. The same objection.

The Court. The same ruling.

A. Forty, altogether.

Mr. Gleason. How many cases of athlete's foot?

A. Well, I believe eleven or twelve cases.

Yes, my wife suffered from a skin disease; she had a fungus infection from the ground from working in the yard. It attacks the nails; it is caused from the trichophyton that gets imbedded into the skin and works its way in and causes itching; it turns the nails dark. I saw an opportunity of trying out this Colusa Oil and I used it on her.

Here Mr. Gleason asked that a photograph be marked 'J' for identification, and another be marked 'K' for identification, and they were so marked by the clerk.

The witness was then shown Defendants' Exhibit J for identification, and testified it was a photograph of the hands of his wife, Mrs. C. E. Von Hoover.

I caused the photograph to be taken and it depicts the condition of Mrs. Von Hoover's hands as they were about the middle of March, 1942, before I used Colusa Oil in their treatment. It was a hard case, taking weeks to recover. Yes, the Colusa Oil cleared the hands; there was no sign of the infection.

The witness was shown Defendants' Exhibit K for identification, and testified: this is the photograph of the hands of my wife after concluding four weeks' treatment with Colusa Oil, and it accurately portrays the condition of her hands at that time.

Defendants' Exhibits J and K were then admitted in evidence, over objection, and marked Defendants' Exhibits J and K.

Yes, I observed the use of Colusa Natural Oil on a man named Mercurlin, who met a premature death. He was a deputy sheriff.

Q. What skin disease did he have, Doctor?

Mr. Zirpoli. I object to that on the ground that this witness is not qualified to testify to that.

The Court. Objection sustained.

Mr. Gleason. Q. Do you know what disease he had?

Mr. Zirpoli. The same objection.

The Court. The same ruling.

Mr. Gleason. Q. He had a skin disease, did he, Doctor?

A. He did.

Q. On what part of his body?

A. On the right arm.

Mr. Zirpoli. I ask that the answer go out. He is not competent to testify.

Mr. Doyle. We will take a ruling of the Court.

The Court. Proceed.

Scaling appeared and then blood exuded. I observed those conditions; Colusa Oil was used in treatment. No, I did not observe the results of the use of this oil in this case because he met a premature death, being killed by a lawyer.

Mr. Gleason. Q. What is your opinion, Doctor, based upon the many tests made by you in your laboratory and in these clinics, and based upon your training as a pharmacologist, and based on your studies of the science of pharmacology, what is your opinion as to the efficacy of Colusa Oil in the treatment of psoriasis?

Mr. Zirpoli. I want to interpose an objection, your Honor.

The Court. Objection sustained. Proceed.

Mr. Gleason. Note an exception, if your Honor please.

The Court. Let an exception be noted.

Mr. Gleason. Q. Doctor, what is your opinion, based on the tests that you have made, and on your training as a pharmacologist, your observations of the use of Colusa Natural Oil on persons suffering from skin diseases, what is your opinion as to the efficacy of the product in the treatment of such diseases?

Mr. Zirpoli. I want to make my objection for the record, that this man is incompetent to testify to the efficacy of it.

The Court. I am going to try to get through with this witness. He may answer it.

A. Yes, it is an effective treatment.

Q. What did you observe as to what it accomplishes, Doctor?

Mr. Zirpoli. The same objection. This is an incompetent witness.

The Court. He may answer.

A. The results were good.

I found this oil had penetrating powers by rubbing the epidermis briskly for two minutes, and it will show under the microscope on the follicles of the hair, and by this I found it penetrates.

If a homeopath consults me as a pharmacologist, naturally I resort to the homeopathic pharmacopoeia; or if the allopath consults me, I resort to the allopathic pharmacopoeia for the doses.

Q. With respect to these homeopaths, have you had occasion to check and determine what the homeopaths describe as a dose of sulphur?

A. For the homeopath pharmacologist, you see, the percentage, the metric system isn't used by the homeopaths. They use a potency in the Materia Medica, which is equivalent to the metric system, or percentage, and as to grains. For instance, I may say, if you want gelsenium, or sulphur, the homeopath ointment would be a 12 potency, equal to about 1/10 of a grain, or a per cent. If it is a question of allopathy, in the regular school of medicine, there is your Pharmacopoeia that says two per cent is effective. We must say, as pharmacologists, as to both schools that consult us. Therefore we have two books.

Yes, based on my training as a pharmacologist, and as a man who tests drugs, and based upon my study of subject, and based upon my observation of the use of Colusa Natural Oil, it is my opinion that this Colusa Oil is efficacious to relieve discomfort and pain, and that it is efficacious to inhibit the spread of skin irritation over the normal skin surface." (Tr. 117-130.)

Thereafter appellants sought to introduce in evidence two reports on the use of Colusa Oil in both animal and human therapy. Appellee's objections to the introduction of these reports in evidence were sustained, and in view of the record, properly so. The record in that connection discloses the following:

"At the end of my three months' clinical investigation of Colusa Oil to determine the efficacy of this preparation, I prepared a report which covered both the animal and human therapy; I personally prepared the clinical findings and report and I have that report here with me.

At this point, the Court permitted Mr. Zirpoli to ask questions of the witness who thereupon testified:

I prepared these reports on the 28th day of May, 1942; they were prepared by me; *I referred to the reports of doctors and physicians in our clinic; we make up our case record which is signed by the physician.*

I personally observed each and every case referred to in the report; and I was present in the clinic when this oil was administered to the patients. This investigation was started around April 1st and completed May 28th. At the time of completion of the investigation, I sat down and typed this report covering the results of it; *I relied only on the case records,* the actual facts there of the patient; these records are kept in our clinic; these case records have been made available to the Federal Food and Drug inspectors in connection with this case; ever since the adoption of the Food and Drug Act, these inspectors have examined our records. This report is based on my knowledge of the cases referred to.

Mr. Zirpoli again was permitted to examine the witness, who continued:

My secretary and I wrote these case reports in the presence of the physician, and I personally examined each of the cases on which we have a record and on every one of the days the patient appeared. I was with the physician when these reports were made. *I am not a medical doctor; I am a pharmacologist; I rely on the medical doctor in the matter of treatment."* (Tr. 131-132.)

* * * * * * *

"Mr. Gleason. Q. Dr. Von Hoover, do you have in your possession at the present time an

original memorandum made by you of the facts as to your observations of these various diseases, psoriasis, eczema, athlete's foot, impetigo, varicose ulcers, poison ivy or oak, and hemorrhoids, as to which you and *your associates* made a clinical investigation?

A. Yes.

Q. And that report was prepared by you, was it not?

A. Yes.

Q. And are the facts there set forth in that report, facts that you personally observed and ascertained in this clinical investigation?

A. Yes.

At this time the report was marked Defendants' Exhibit L for identification." (Tr. 133.)

It will be noted that Exhibit L for identification is signed as follows:

"J. W. BURBY, D.V.S.,
Director
(Former Major U. S. Army
Veterinary Corps.)
Broadway Veterinary Hospital & Clinic
San Antonio, Texas.

Member: American Veterinary Medical Association. State Association, County & State Veterinary officer.

Micropis & Laboratory:
C. E. VON HOOVER
M.S.D.Sc.

Subscribed and Sworn to Before Me, this 9th day of June A.D. 1942.

J. Reynolds Flores
Notary Public,
Bexar County, Texas." (T. 138.)

The witness was then shown Exhibit M for identification. It will be noted that this report is signed as follows:

"A. BERCHELMANN, M.D.,
Clinician.

Member: American Medical Association. Bexar County Medical Society, Selective Service Administration.

Former: House Physician Santa Rosa Hospital, City Health Officer, San Antonio, Texas. Capt. U. S. Army Medical Corps.

C. E. VON HOOVER,
M.S.Dsc. Phd.
Chemistry and Laboratory
and Technical Assistant
to the Clinician.

Subscribed and Sworn to before me this the 28th day of May A. D. 1942.

J. REYNOLDS FLORES
Notary Public,
Bexar County, Texas." (Tr. 144-145.)

In connection with these exhibits the record shows as follows:

"Mr. Gleason. I will ask that a report entitled, 'Some clinical experiments with a sulphonated hydrocarbon oil' be marked for identification.

Whereupon the document was marked Defendants' Exhibit N for identification.

Mr. Gleason. Q. You have given me several reports, Doctor. Defendants' Exhibit L for identification, without stating its contents, is what?

A. It is my report.

I prepared it; that is my report of the results of the application of Colusa Natural Oil to the

skin of animals; *associated with me was Dr. Burby, a veterinarian.*

The witness was again questioned by Mr. Zirpoli.

I am not a veterinarian.

Mr. Zirpoli. Q. And this is a veterinarian's report:

A. You see my name on the other side as the laboratory man, on the other side there, the man that made the findings in the presence of the veterinarian. He couldn't make those tests because he is not qualified in bacteriology.

Q. You made the microscopic and laboratory tests?

A. That is correct.

Q. And he made all the veterinarian tests with relation to treatment?

A. *I am not a veterinarian. I do not apply medication.* In that case I did; it did not involve the practice of medicine.

Q. This report is predicated upon the experiments conducted upon the animal?

A. That is correct.

Q. *Made by Dr. Burby?*

A. *And myself.*

Q. But Dr. Burby did the actual administration?

A. No, I administered to some dogs the application of oil in his presence.

Q. This purports to be his conclusion as a veterinarian, too, does it not?

A. Canine dermatology is the practice of the veterinarian, and, naturally, *he would sign as the veterinarian,* and I as the scientist, the micrologist.

Mr. Gleason. Q. I am going to ask you to refer to Defendants' Exhibit L for identification and ask you if that document refreshes your recollection as to facts observed by you in these clinical tests on animals as to the therapeutic value and power of the Colusa Natural Oil?

A. Yes.

Q. Please state briefly the facts observed by you in these clinical tests on this animal therapy as to the results of the use of Colusa Natural Oil on skin diseases of animals. And, Doctor, confine yourself to the facts that you know of your own knowledge and do not read any of the opinions if they are opinions of Dr. Burby.

Mr. Zirpoli. I want to make this objection, your Honor. He is asked to testify as to the effect of the application of this oil, which calls for his opinion and conclusion as a veterinarian.

The Court. Objection sustained.

Mr. Acton. Will your Honor allow us an exception to that ruling?

The Court. Note an exception.

Mr. Gleason. Q. Doctor, in the practice of your profession as a pharmacologist and your work for these firms that you mentioned yesterday, including the Goodman Laboratories and the rest of them, as their consultant, do you in the practice of your profession resort to animal therapy to test the efficacy of drugs and preparations?

A. Yes.

Q. Is that a part of the ordinary practice of the ordinary pharmacologist?

A. That is the practice.

Q. I will ask you to state, Doctor, the facts that you observed, in your clinical examinations;

that is to say, this animal therapy, from the use of Colusa Natural Oil upon the skin diseases of dogs and cats used in this animal therapy.

Mr. Zirpoli. May it please the Court, I submit that the question is identical in different terms and the objection is made exactly as it was made to the last question.

Mr. Doyle. This question asks for the knowledge of the witness.

The Court. The objection will be sustained.

Mr. Acton. May we have an exception to the ruling?

The Court. Note an exception.

Mr. Zirpoli. May I have the record also show that my objection is on the ground that it is irrelevant and immaterial to the case.

The Court. Let the record so show.

Mr. Gleason. Q. Doctor, I will ask you to refer to Defendants' Exhibit M for identification. Did you personally prepare that report?

A. Yes.

Q. What is it?

A. It is a report of the clinical results of oil on the physiological tests on human patients.

Q. Those are the one hundred and some-odd patients you mentioned yesterday afternoon?

A. This contains a hundred, this report.

This report contains the essential facts which I observed in the making of these tests with Colusa Natural Oil on those one hundred patients.

Q. Does this report, Doctor, contain a statement of the facts observed by you in these clinical tests made by you and your associates in your presence, on human beings, to ascertain the therapeutic value of Colusa Natural Oil in the treat-

ment of psoriasis, athlete's foot, impetigo, varicose ulcers and hemorrhoids?

A. Yes.

Q. And also acne? I omitted acne.

A. No, I don't believe we tested it on acne.

Q. You are right, Doctor, you did test for poison oak and ivy?

A. Yes.

Q. Now then, will you, by reference to this report——

Mr. Zirpoli. May I ask some foundational questions before I interpose any objections? *This report also purports to be the report of Dr. A. Berchelmann, M.D., clinician, is that correct?*

A. *Yes.*

Q. *And this report also purports to show the effects and results secured by the treatment of these human persons by the physician and surgeon, is that correct?*

A. *Yes.*

Mr. Zirpoli. Then, your Honor, I submit that the witness is incompetent to testify as to the facts herein contained on the grounds that it is not exclusively the information of the witness, and on the further ground that it contains hearsay testimony predicated upon hearsay facts of a physician and surgeon, a person other than himself, and on the further ground that he is not competent as a physician and surgeon to testify as to the effect and results.

The Court. Same ruling. The objection will be sustained.

Mr. Acton. May we be allowed an exception to the ruling?

The Court. Note an exception.

Mr. Gleason. You testified yesterday as to your opinions and conclusions as to the efficacy of this drug in the treatment of these various diseases. Did you investigate in these tests on human beings to determine the toxic effect of the preparation?

A. I make the toxic test before it is submitted to clinicians. That depends on me.

Mr. Zirpoli. We will admit that it is not poisonous, counsel.

Mr. Gleason. Not toxic?

Mr. Zirpoli. Yes, poisonous; toxic means poisonous, I think. There is no issue as to that.

Mr. Gleason. Q. And in the cases personally observed by you in these clinical tests, in any of these cases did you observe any unfavorable or injurious results from the use of Colusa Natural Oil on these patients?

Mr. Zirpoli. Objected to as calling for an opinion and conclusion, your Honor, of this witness, who is not a physician and surgeon.

Mr. Gleason. That is his business, if your Honor please, and profession; he tests drugs.

The Court. The objection will be sustained.

Mr. Acton. May we note an exception to that ruling?

The Court. Note an exception." (Tr. 145-151.)

Thereafter on cross-examination Dr. Von Hoover testified as follows:

"I am a Doctor of Science; I am not a physician and I am not a veterinarian; I operate a clinical investigation agency; *I do bacteriology;* that is incorporated in my Doctor of Science degree. I am permitted to practice bacteriology. *Colusa Oil was never tried out as a germicide; we*

did not make any germicidal test. In determining if a product has germicidal properties, I would submit it to the staphylococci germ test, the streptococci test; to bacteriological tests." (Tr. 151.)

Incidentally it might here again be observed that one of the false claims alleged in the labeling was that Colusa Natural Oil kills and checks disease germs. This was clearly established by appellee, and appellants admitted, by the above statement, that they made no germicidal tests, thereby leaving the record uncontradicted and conclusive of the appellants' guilt as to this claim, which we repeat in and of itself calls for a guilty verdict.

Dr. Von Hoover then testified that he uses United States Pharmacopoeia No. 11 and said "We rely on the pharmacopoeia absolutely; I wouldn't say it is our Bible, it is our law." He further said it was the one used in his studies in Europe (Tr. 151). Yet he could not tell us how much iodine is in tincture of iodine (Tr. 154), and said that the amount of sulphur prescribed by the pharmacopoeia for a sulphur ointment is 5 and 10 per cent (Tr. 154). Page 424 of the Pharmacopoeia was introduced in evidence and it provides: "Sulphur ointment contains not less than 13.5% and not more than 16.5% S—meaning sulphur" (Tr. 272).

The witness after testifying that his investigation of mange covered the "full range starting with the egg and ending up with the full grown grub" went on to classify it as *vegetable origin* (Tr. 156), an obvious, simple and conclusive indication of his gross incompe-

tence as a witness. And being further pressed about athlete's foot and its classification as a fungus, he testified as follows:

"Q. How about athlete's foot?

A. It is fungus, Trichophyton microsporum.

Q. Do you know whether that is vegetable or animal?

A. That is vegetable.

Q. Do you know what schizomycetes are?

A. That is animal.

Q. That is one of the primary classifications, isn't it?

A. Fungus.

Q. You say it is animal, and a moment ago you told us that fungi are vegetable.

A. Fungus is a growth. It is from the earth. It could be classed as vegetable. Certainly it is vegetable. *As I told you, I am not a bacteriologist; I only make these investigations of my own accord.*

Mr. Zirpoli. That is all.

Mr. Gleason. That is all, Doctor." (Tr. 156-157.)

Thus we have a man who endeavors to create the impression that he knows bacteriology "I do bacteriology * * * I am permitted to practice bacteriology", admitting his limitations when pressed on the subject. With this record before us, can it be said that the trial Court committed prejudicial error in excluding portions of the testimony of Dr. Von Hoover—we think not.

At the outset we wish to stress the fact that although Dr. Von Hoover is neither a physician nor a

veterinarian, he was actually allowed to invade the expert realm of both. He testified as to the tests made with Colusa Natural Oil in canine dermatology (Tr. 118), to the results obtained from the treatment of skin diseases of his wife (Tr. 126-127), J. R. McDonald (Tr. 122-123) and a Mrs. Nelly (Tr. 124-125), and finally he gave testimony with respect to the chief matter in issue at the trial, to-wit, the efficacy of Colusa Natural Oil in the treatment of skin diseases. He testified that in his opinion Colusa Natural Oil "is an effective treatment" for persons suffering skin diseases and that the results obtained from its use were good (Tr. 129). He further found that the oil had penetrating powers when applied on the skin (Tr. 129) and that "it is efficacious to inhibit the spread of skin irritations over the normal skin surface."

In view of Dr. Von Hoover's incompetency to testify as to these matters the trial Court in the exercise of its discretion committed no error when it would not permit further testimony from this witness on clinical reports (human and animal) based upon findings of a physician and a veterinarian.

No proper foundation was laid for the admission of Exhibits L, M and N in evidence. They represented the findings of persons other than himself and were clearly hearsay and opinioned evidence which they alone were qualified under the circumstances to give.

The right to pass upon the qualifications of Dr. Hoover as an expert in those matters with relation to which his testimony was excluded, rested entirely in the discretion of the trial Court, and if the trial Court

was not satisfied as to his qualifications, it had a perfect right to exclude his testimony.

The rule is well stated in

Wigmore on Evidence (3rd Ed.), Volume II, section 561(2), "Discretion of Trial Court":

"Secondly, and emphatically, the *trial Court must be left to determine,* absolutely and without review, the fact of possession of the required qualification by a particular witness. In most jurisdictions it is repeatedly declared that the decision upon the experimental qualifications of witnesses should be left to the determination of the trial court."

The pertinent rule followed by the Federal Courts was lucidly stated in

Morton Butler Timber Co. v. United States, 91 Fed. (2d) 884, at 886 and 887 (C.C.A. 6th, 1937):

"The rule is settled that the decision of the trial court, with respect to whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is conclusive unless clearly shown to be erroneous in matter of law. (Cases cited.) The finding of the trial court on a question of fact, upon which the admissibility of evidence depends, will not be reversed on appeal, if the finding is fairly supported by the evidence. (Cases cited.)

In Clark v. Hot Springs Electric Light & Power Co., 55 F. (2d) 612, 615 (C.C.A. 10), it was held that the competency of an expert is a preliminary question resting in the discretion of the trial court, and its decision in the absence of a plain error of law, serious mistake of fact, or

abuse of discretion, will not be disturbed. (Cases cited.)''

In the case of

Hamilton v. Empire Gas & Fuel Co., 297 Fed. 422, at page 430 (C.C.A. 8th),

the Court said:

''The decision as to the qualifications of an expert witness is peculiarly within the province of the trial court, and should not lightly be set aside. The trial court has a reasonable discretion in passing upon such qualification which will be respected by the Appellate Court in the absence of a clearly erroneous ruling. (Cases cited.)''

This broad latitude of discretion invested in the trial Courts has been upheld and approved by the United States Supreme Court in a number of cases. In

Spring Company v. Edgar, 99 U.S. 645, at 658,

the Court said:

''Cases arise where it is very much a matter of discretion with the Court whether to receive or exclude the evidence; but the Appellate Court will not reverse in such a case, unless the ruling is manifestly erroneous. (Cases cited.)''

Again, in

Stillwell and Bierce Manufacturing Company v. Phelps, 130 U.S. 520, at 527,

the Court said:

'' * * * Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial; and his decision of it is conclusive, unless clearly shown to be erroneous in matter of

law. *Perkins v. Stickney,* 132 Mass. 217, and cases cited; *Sorg v. First German Congregation,* 63 Penn. St. 156."

The following appears in the decision of

Inland and Seaboard Coasting Company v. Tolson, 139 U.S. 551, at 559:

"The ground of the exclusion of the question appears to have been that the judge was not satisfied of the qualifications of the witness as an expert upon the subject inquired of. Whether a witness is shown to be qualified to testify to any matter of opinion is always a preliminary question for the judge presiding at the trial, and his decision thereon is conclusive unless clearly erroneous as matter of law,"

and in

Chateaugay Ore and Iron Company v. *Blake,* 144 U.S. 476, at 484,

the Court said:

"* * * How much knowledge a witness must possess before a party entitled to his opinion as an expert is a matter which, in the nature of things, must be left largely to the discretion of the trial court, and its ruling thereon will not be disturbed unless clearly erroneous. (Cases cited.) * * * We think the ruling of the trial court in excluding his (the witness's) opinion was right; at any rate, it cannot be adjudged clearly erroneous."

Bradford Glycerine Co. v. Kizer, 113 Fed. 894, C.C.A. 6,

involved an appeal from a verdict rendered in a tort action arising out of personal injuries sustained by

the plaintiff when certain nitroglycerine exploded as a result of the defendant's alleged negligence. The Court in dealing with the propriety of the trial judge's exclusion of testimony of an expert offered by the defendant said (p. 896):

> " * * * The other question was properly excluded on the ground that the witness was not shown to be qualified to answer it. He was a well-shooter, and had had considerable experience, but it was not shown that he had peculiar knowledge of any chemical action that might be produced by the sun's rays upon the substance in the wagon. It was urged that his long experience in handling nitroglycerine and assisting in its manufacture qualified him to express an opinion, but such qualification is a question for the trial judge, and its determination is very largely in his discretion. * * * ."

The short answer to the impressive list of authoritives cited in the appellants' brief is that none of them bears on the specific issue involved in the principal case. The narrow question, it appears, is this: Did the Court abuse its discretion? Were its rulings so clearly erroneous, to the prejudice of the appellants, that the conscience of the Appellate Court will be shocked? Can these questions be answered in the affirmative after reading the so-called expert's testimony on cross-examination when a searching light was cast on the knowledge he had of relevant scientific matters?

Dr. Von Hoover's extensive claims of scientific background are discredited by the record and much of the testimony (reports) he sought to give was clearly

hearsay and represented the opinions and findings of persons other than himself.

The trial Court in its sound discretion had a right to require that the appellants' evidence in the expert field be of equal competence to that adduced by the Government. The appellants were not prejudiced. According to Dr. Von Hoover himself, there were in his laboratory and clinic able and competent medical doctors who diagnosed the ailments of the patients, dispensed the appellants' product, and observed the results therefrom. Also, a veterinary participated in making the tests on animals. These professional gentlemen could have been called and qualified as expert witnesses for the appellants. In the final analysis this situation falls within the category as stated in

Spring Co. v. Edgar, supra,

> "Cases arise where it is very much a matter of discretion with the Court whether to receive or exclude the evidence."

From the record in this case and the foregoing authorities it should be obvious that no prejudicial error was committed by the trial Court in connection with the testimony of Dr. Von Hoover.

Chester Walker Colgrove testified that he is one of the defendants in the case and is engaged in the business of producing and marketing Colusa Natural Oil (Tr. 161). He then testified as to the beneficial results secured by one Walter Litholand by using Colusa Natural Oil in treating a skin disease of the hands (Tr. 163-164). He also testified as to the beneficial results secured in treating the diseased condition of the

hands of one Homer H. Baumgartner and in connection with this testimony Exhibit "O" was introduced in evidence (Tr. 164-168). He also testified that he successfully used Colusa Natural Oil in the treatment of an eczema spot on himself and observed the penetrating power of the oil (Tr. 168). The Government then objected to the introduction in evidence of a letter marked Exhibit "P" for identification and was sustained in the objection (Tr. 171-175). This letter had no bearing upon the issues before the trial Court and merely went to the good faith or lack of criminal intent of Colgrove, neither of which appellee submits are elements involved in the crimes charged in the information.

The witness then testified that he personally did not have anything to do with the mailing of the ointment, in interstate commerce, and that he did not know that the ointment was being shipped with the particular labels on the bottles that were in fact there and that when he discovered that such labels were going out he destroyed the rest of them and ordered corrected labels. (Tr. 175-176.)

Appellee then asked "that that all be stricken out as irrelevant and immaterial" and the Court said that "the objection will be sustained" (Tr. 176). A further objection to his testimony that he had ordered that "¾ of an ounce" be placed on the labels was sustained (Tr. 176).

The record then discloses the following:

"Mr. Gleason. Q. In the information, Mr. Colgrove, there is a statement set forth, 'Colusa

Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete's foot or ringworm, poison ivy, varicose ulcers, burns and cuts.' You have been marketing this oil for approximately two or three years, as I recall your testimony. Upon what did you base this statement that is contained in this information, the statement just read?

Mr. Zirpoli. I object, your Honor, it is irrelevant and immaterial as to what he based it on: all that matters is the fact that the statement is there and the statement speaks for itself.

Mr. Gleason. In this information are various statements quoted from the advertising matter. Counsel has submitted to your Honor instructions that we desire to argue to the effect that if any false statement is contained in any portion of the advertising matter, the mats or otherwise, that this man can be convicted. We desire to show the truth of this statement. We desire to show that when Mr. Colgrove said that 'Colusa Natural Oil is credited by other users' he was telling the truth, and we desire to submit to your Honor hundreds of testimonials in regard to this product received from users by the defense.

The Court. Testimonials cannot go into evidence here.

Mr. Gleason. I don't want you to think I am going contrary to your ruling. I make the statement, I make it as an officer of this court, that I believe under this information, under settled principles of law—

The Court. You may believe whatever you see fit.

Mr. Gleason. May I present the law to your Honor on that subject?

The Court. No, we will proceed. You make your offer of proof, and you have a record to protect you, and I will rule.

Mr. Gleason. Q. Mr. Colgrove, in the course of your marketing of this product, can you tell us the number of sales that have been made of this product to people throughout the United States?

A. Many thousands of them.

Q. You sold your product on a money-back guarantee, did you not?

A. Yes.

Q. Can you tell us how many of the people to whom you sold this product throughout the United States availed themselves of the opportunity to receive their money back?

Mr. Zirpoli. I object to that as irrelevant and immaterial, and a form of negative proof. I object to it.

The Court. The objection will be sustained. We are not here concerned with any money-back guarantee. There is no issue involved in this case about money or money back for any sales. Let us proceed.

Mr. Acton. Will your Honor allow us an exception to the last ruling?

The Court. Certainly.

Mr. Gleason. Then we make the offer of proof and that will conclude this subject. We offer to prove the following facts by this witness at this time:

First, that from persons to whom this preparation was distributed by these defendants throughout the United States, hundreds of testimonials,

the originals of which are here available for inspection and we have gone to the trouble of copying them—hundreds of testimonials, voluntary testimonials, have been received by this company and by this defendant.

We further offer to prove that this product was marketed and distributed to these thousands of persons under a money-back guarantee if not satisfied, and that out of the thousands of people to whom that guarantee was made, approximately two per cent availed themselves of the guarantee.

We further offer to prove, if the Court please, the truth of the statements contained in this information. We offer these testimonials, and these testimonials will prove the truth of the statements that 'Colusa Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete's foot or ringworm, poison ivy, varicose ulcers, burns, and cuts,'—the statement contained at lines 13 to 16 and page 3 of this information and reincorporated by reference in later portions of the information. And we offer those facts, if the Court please, as being relevant, pertinent and competent in the proof of the issues involved in this case.

Mr. Zirpoli. If I might respectfully submit, your Honor, as I have heretofore had occasion to state in arguing various points before the Court, that there was no element of fraud or bad faith involved; it is a simple case of misbranding, and that therefore testimonials are not admissible in evidence. Had this been a fraud case, then the position taken by counsel would have been a proper one, but this is a misbranding case and not a case predicated upon fraud or fraudulent intent.

The Court. The exception will be sustained.

Mr. Doyle. Exception if your Honor please.

The Court. Certainly.

Mr. Gleason. At this time, if the Court please, simply to complete the record, we desire to have the original testimonials marked for identification.

Q. To get a preliminary foundation, you have handed me, Mr. Colgrove, a file containing various papers. Did you prepare that file?

A. No, sir; those letters were written by individuals.

Q. I mean, did you put these into the file?

A. Yes, sir.

Q. What are they?

A. Voluntary testimonial letters received from purchasers of Colusa Natural Oil products.

Q. And you personally know that these are voluntary testimonials sent into the office?

A. Yes, sir.

Thereupon, Mr. Gleason offered these original testimonials in evidence.

Mr. Zirpoli. Same objection; irrelevant and immaterial.

The Court. Same ruling.

Mr. Gleason. May they be marked, then, for identification?

The Court. Let them be marked for identification.

The proffered testimonials were then marked Defendants' Exhibit Q-1 for identification."

These testimonials appear on pages 181-250 of the Transcript of Record.

This was followed by the following evidence:

"Mr. Gleason. Q. You heard me read, Mr. Colgrove, a statement from the information in this case with respect to other users crediting various and sundry things, a statement contained in some of the advertising matter. Upon what did you base that statement?

Mr. Zirpoli. Same objection; irrelevant, incompetent and immaterial.

The Court. Objection sustained.

Mr. Doyle. I desire an exception, if the Court please.

The witness continued:

Yes, I made a very thorough investigation before engaging in the marketing of this product; I talked with users of the oil; engineers, people who had sold it previously to my knowledge of it, or having heard of it; and it had the reputation of a real miracle product.

Mr. Zirpoli. Your Honor, I ask that the witness' statement about its reputation go out.

The Court. Let the miracles go out, ladies and gentlemen of the jury, and disregard it for any purpose in this case.

Mr. Gleason. Do you have available, Mr. Colgrove, the statement upon the basis of which these statements were incorporated in the newspaper mat with respect to the efficacy of radium through the body. Can you give counsel the authorities from which that was procured?

A. Yes, sir.

Mr. Zirpoli. I object to that. Authorities as given by this witness are irrelevant and immaterial.

Mr. Doyle. May he answer the question, if your Honor please?

The Court. What question?

Mr. Doyle. The question as to the source from which he obtained this statement which appears quoted in the mat. It appears as quoted.

The Court. It matters very little the source of the information or where it came from. We are not concerned with the source of it.

Mr. Doyle. Exception, if your Honor please.

It was here stipulated that if Miss Nelson, representative of the firm which printed the labels, were called she would testify this was a mistake on the part of her printing firm; and that in the printing of the labels involved in the Third Count in this case, the designation '¾ of an ounce' was inadvertently omitted from the labels, and that Mr. Colgrove, as manager of the defendant company had previously sent said printing firm a letter, marked here as Defendants' Exhibit P for identification, which was received by the McCoy Label Company; and that within a week of this time, Mr. Colgrove had the label company correct this inadvertence and put upon the label the designation '¾ of an ounce'. Will that be so stipulated?

Mr. Zirpoli. Subject to the objections heretofore made that it is irrelevant and immaterial.

The Court. Objection sustained.

Mr. Gleason. An exception, if the Court please.

The Court. Very well.

Mr. Gleason, at this time, to complete that record, offered in evidence Defendants' Exhibit P for identification, which is the letter Mr. Colgrove previously referred to.

Mr. Zirpoli. We make the same objection. It was offered once before, and I object again that it is irrelevant and immaterial.

The Court. Objection sustained.
Mr. Doyle. May we have an exception?
The Court. Exception." (Tr. 250-253.)

On cross-examination the witness was questioned over objection of his counsel as to his previous business connections and experience (Tr. 253-254) and he was also questioned over objection of his counsel as to a letter, appellants' Exhibit 13, wherein the letters "MD" appear in what purports to be a typewritten copy of a letter signed by Dr. William G. Woodman (Tr. 254-259). This testimony was elicited solely for the purpose of testing the credibility of the witness (Tr. 255).

Appellants contend that the trial Court committed several errors in connection with the testimony, to-wit:

Appellants contend that the trial Court committed prejudicial errors in connection with the testimony of Mr. Colgrove:

(1) When it refused to permit the introduction of appellants' testimonials in evidence;

(2) When it refused appellants the right to show that the omission of certain quantitative designations from the label involved in the third count was inadvertent;

(3) When it refused appellants the right to show the source from which certain statements with relation to radium emanations were secured;

(4) When it refused to permit appellants to show that less than two per cent of the purchasers

of its drugs availed themselves of appellants' money-back guarantee;

(5) When it refused to permit appellants to show that they at times distributed their products on a "gratitude price offer" and free of charge to hospitals, doctors and persons unable to pay for the same;

(6) When it permitted appellee to cross-examine Mr. Colgrove on his past business background and experience and the so-called testimonial letter of Dr. Woodman.

All of these matters excepting the last (6) involve questions of appellants' knowledge, intent or good faith in the distribution of their products, elements which have absolutely nothing to do with the issue involved.

The Federal Food, Drug and Cosmetic Act of June 25, 1938 (Section 333(a) and (b) of Title 21 U.S.C.A. 3,

provides:

"Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine."

"Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 331, with intent to defraud or mislead, the penalty shall be imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine."

The information in this case is charged under subdivision (a). Had it been charged under subdivision (b), the intent, knowledge or good faith of the shipper would have been material, but under subdivision (a) an interstate shipment of a misbranded drug is a misdemeanor regardless of the intent, knowledge or good faith of the shipper.

United States v. 13 crates Frozen Eggs, 215 F. 584 (CCA-2);

Sprague v. United States, 208 F. 419 (D.C.);

Strong, Cobb v. United States, 103 F. (2d) 671 (CCA-6);

United States v. Dr. David Roberts etc., 104 F. (2d) 785 (CCA-7);

United States v. 11¼ Dozen Packages, etc., 40 F. Supp. 208;

United States v. 6 Devices, etc., 38 F. Supp. 236;

United States v. Buffalo Pharmacal Co., 131 F. (2d) 509 (CCA-2).

Furthermore the testimonials were clearly hearsay as was the fact that less than two per cent of the purchasers of these products availed themselves of the money-back guarantee.

See

Goldstein v. United States, 63 F. (2d) 609 (CCA-8);

United States v. 11¼ Dozen Packages, etc., supra.

On source of appellants' information see

United States v. John S. Fulton Co., 33 F. (2d) 506 (CCA-9).

It is therefore evident that the trial Court properly excluded the testimonials, evidence of inadvertent omissions of quantitative designation from label, source of information placed in newspaper mat, evidence of fact that less than two per cent of purchasers asked for money back, evidence of gratitude price offer and free distribution to certain institutions and persons, since all of these could possibly pertain only to appellants' good faith and lack of criminal intent.

As for the cross-examination of Mr. Colgrove, appellee had a perfect right to examine him as to his past activities and to test his credibility in connection with the copy of letter of Dr. Woodman, initialed "MD" (either inadvertently or intentionally).

ALLEGED ERROR IN CONNECTION WITH TESTIMONY OF DR. TAINTER.

Without again reviewing the qualifications of Dr. Tainter, it suffices to say that as a pharmacologist, professor and physician he was competent to testify as to the effect to be expected from the use of this oil in the treatment of poison ivy and any difference he

may have noted in it from crude petroleum oil. The foundation previously laid for these questions was more than ample.

THE ALLEGED UNFAIRNESS OF THE TRIAL COURT.

The alleged unfairness of the trial Court consists in the judge's comments during the testimony of

(1) Dr. Vincent, "Proceed, let us get through with this witness" (Tr. 99);

(2) Dr. Von Hoover, "Let us get through with this witness" (Tr. 122), "I will allow him to answer in the hope we will get through soon" (Tr. 123), and "I am going to try to get through with this witness" (Tr. 129);

(3) Mr. Colgrove, "We are not concerned here with what you are interested in" (and in fact under the issues we were not) (Tr. 161) and "Let's get through with this witness", and

(4) Mr. A. W. Scott, "Is that all from this witness?" (Tr. 159).

These appear to be rather trivial matters upon which to predicate a charge of unfairness upon the part of the trial Court, particularly when we bear in mind the length of the trial, and if they were improper comments, they certainly were harmless. See

Glasser v. United States, 315 U.S. 60, 82;

United States v. Lee, 107 F. (2d) 522.

However, this Honorable Court should not consider this point, as appellants' rights were not saved. At no

time did appellants object to these comments of the Court.

The United States Supreme Court in the case of *Drumm-Flato Commission Co. v. Edmisson,* 208 U.S. 534,

said at page 540:

> "Plaintiffs in error finally complain as ground of error of certain remarks by the court which, it is contended, were prejudicial. The Supreme Court (Territory of Oklahoma) replied to this assignment of error that no objection had been taken to the remarks complained of. Counsel now say that to have made objection would have made 'a bad matter much worse'. But we cannot accept the excuse. We have examined the remarks complained of, and we do not think they had the misleading strength that is attributed to them. At any rate, it was the duty of counsel to object to them, and if then the court made matters worse, or did not correct what was misleading or prejudicial, its action would be subject to review."

In

Lane v. Leiter, 237 Fed. 149 (C.C.A. 7th), at 158 and 159,

the Court said:

> "Complaint is made of certain remarks of the trial judge in the presence of the jury; but as the record does not show objection or exception to the remarks at the time the matter is not reviewable. (Cases cited.)"

This rule was again recognized in

Panama R. Co. v. Strobel, 282 Fed. 52 (C.C.A. 5th),

when the Court said (p. 53):

> "No objection was made or exception noted during the trial to the remark of the court to counsel, and hence no error now assigned as to it can be considered by this court. (Cases cited.)"

A case directly in point was decided by the Circuit Court of Appeals for this circuit. It is

Wolf v. Edmunson et al., 240 Fed. 53 (C.C.A. 9th, 1917).

In that case the propriety of the trial judge's comment on a line of inquiry was in issue. Objection was made to the admissibility of the evidence, but not to the trial Court's statement. After discussing the harmlessness of the statement the Court said (p. 57):

> "* * * However, as there was no objection to this statement by the court when it was made, and no exception taken to it at the time, it must be treated as wholly without merit."

ALLEGED ERROR IN CONNECTION WITH THE TESTIMONY OF MR. EVERETT AND MR. COLGROVE.

The alleged error in connection with the testimony of Mr. Everett as to his conclusion concerning a friend who had used these products was at most harmless and he was not precluded from giving a physical description of the man. However, counsel for appellants declined to further pursue this line of testimony for the

record further shows (to conclude the testimony quoted on page 73 of Appellants' Opening Brief) that after Mr. Zirpoli had said "He was thin", counsel for appellants stated "That is all—*never mind that*—that is all" (Tr. 95).

The alleged error in connection with the testimony of Mr. Colgrove pertained not to the case of Baumgartner but to that of Walter and in that connection to conclude the testimony quoted on page 74 of Appellants' Opening Brief the Court said:

> "He may state what he observed at any time and place himself",

and the witness went on to say

> "I observed Walter's bitterness had turned to great relief and joy, etc."

This certainly shows a willingness on the part of the Court to permit the witness to testify to the fullest extent as to his actual observations. The Court under the circumstances properly exercised its discretion and permitted the witnesses to testify not as to their conclusions but to the physical facts they saw.

INSTRUCTIONS OF THE COURT.

A review of the Court's instructions in their entirety (Tr. 274-292) will show that the jury was properly instructed as to all the elements involved in the case.

Appellants' first objections are to the following instructions given by the trial Court:

"The sole and remaining question for you to determine from the evidence in this case is whether or not the drugs covered by the three counts of the information were misbranded as alleged by the Government. If you are satisfied from the evidence beyond a reasonable doubt that the articles of drug bore statements in their labeling or accompanying circulars or newspaper mat that were false or misleading in any particular in which they are alleged in the information to be false or misleading, then the drugs in those counts wherein the labeling is so false or misleading in any particular is misbranded in the manner charged by the Government, and your verdict shall be guilty as to those counts wherein such misbranding exists. If you find from the evidence that the statements in the labeling of the drugs covered by the respective counts of the information support the therapeutic claims of the defendants and are true, then the drugs covered by those counts wherein the statements on the labeling as to therapeutic claims are true, are not misbranded, your verdict should be not guilty for all or any of those counts wherein your so find."

"It is not necessary for the Government to prove that each and all of the statements of each count of the information contained on the label or in the circulars or newspaper mat are false or misleading. If the Government has established by the degree of evidence which I have explained to you, that any one material statement or representation as to the therapeutic effect of the drug upon the label or circular or newspaper mat covered by any one count is false or misleading, then the article covered by that count is misbranded within the meaning of the Federal Food, Drug

and Cosmetic Act, and you should find the defendants guilty as to such counts in which you find the article so misbranded. But if the Government has failed to establish to your satisfaction by that degree of proof and beyond a reasonable doubt any one of the charges of misbranding in any one or more of the counts, then you should acquit the defendants as to such counts."

We respectfully submit that these are absolutely correct statements of the law.

These instructions do not say that the jury shall convict if any statement is false or misleading. They say, "statements * * * that were false, or misleading *in any particular in which they are alleged in the information to be false or misleading"* or "any one material statement or representation *as to the therapeutic effect of the drug upon the label or circular or newspaper mat covered by any one count* is false or misleading", then, etc.

This is a proper statement of the law. See

U. S. v. Doctor David Roberts etc., 104 F. (2d) 785;

U. S. v. Lee, 107 F. (2d) 522;

Goodwin v. U. S., 2 F. (2d) 200.

While the above cases refer to "false and *fraudulent* claims, nevertheless they are clear that under the new act (Section 333a of Title 21 USCA) where no proof of fraud is necessary, all that need be established is that any one claim was false or misleading or to quote the statute "false or misleading in any particular".

Appellants also object to the following instructions given by the Court:

> "The Federal Food, Drug and Cosmetic Act does not make the intent with which an unlawful shipment is made, an ingredient in the offense. The intent of the defendants is immaterial."
>
> * * * * * * *
>
> "Therefore, if you find from the evidence beyond a reasonable doubt that the drugs involved in the three counts of the indictment, or any of them, were in fact misbranded in the manner alleged in the information or any count thereof, you shall find the defendants guilty as charged in those counts wherein you find the drugs were misbranded, regardless of the intent in the minds of the defendants."

and objected to the refusal of the Court to give the following instruction:

> "To constitute a party guilty of crime, the evidence must show intentional participation in the attempt to violate the statutes in question."

As we have heretofore shown in this brief, the Federal Food, Drug and Cosmetic Act does not make the intent with which an unlawful shipment is made, an ingredient of the offense. The intent of the appellants is immaterial. See

United States v. 13 crates Frozen Eggs, supra;
Sprague v. United States, supra;
Strong, Cobb v. United States, supra;
United States v. 11¼ Dozen Packages, etc., supra;
United States v. 6 Devices, supra;
United States v. Buffalo Pharmacal Co., supra.

Finally appellants object to the refusal of the Court to give the following instruction:

> "In this case Mr. Colgrove is jointly charged with the defendant corporation in the information. However, you are instructed that it is the law that an officer of a corporation—and here Mr. Colgrove is President of the corporation—cannot be held liable unless he personally knowingly and actually participates in the commission of the acts alleged to be unlawful. An officer of a corporation is not criminally liable for the acts of the corporation performed by other officers or agents. Therefore, unless you find that Mr. Colgrove did know that the jars of ointment referred to in the Third Count of the information had not been properly labeled, but that the jars of ointment with the incomplete label had been shipped by clerks and employees of the corporation without Mr. Colgrove's knowledge, then and in that event you will find Mr. Colgrove personally not guilty."

It must here be remembered that appellants at the outset of the trial stipulated that *defendants* introduced and delivered for introduction into interstate commerce the misbranded drugs in question.

Furthermore, as shown immediately above the knowledge and intent of Mr. Colgrove is immaterial and the proposed instruction was certainly erroneous when it alleges that Mr. Colgrove cannot be held liable unless he personally *knowingly* and actually participated in the commission of the acts alleged to be unlawful and uses other language in the same instruction to the same effect.

CONCLUSION.

A reading of the entire record in this case clearly reveals evidence more than sufficient to warrant a conviction and establishes the guilt of appellants beyond a reasonable doubt as to each count of the information. Furthermore no prejudicial error was committed by the trial Court in connection with either the evidence or the instructions, and the whole appeal consists of the magnification of alleged errors which are of little importance in their setting. This is particularly true of the alleged incidents of unfairness now relied upon by appellants and about which they made no objection in the course of the trial.

By statute (28 USCA Section 391) this Honorable Court is directed to render judgment after examination of the entire record before the trial Court, without regard to technical errors, defects, or exceptions, which do not affect the substantial rights of the accused. This statute has particular force when the evidence of the guilt of appellants is clear and convincing as in this case. This Court is not permitted to reverse a judgment unless errors have been committed which substantially prejudiced appellants.

Coplin v. United States, 88 F. (2d) 652 (CCA-9);

United States v. Waldon, 114 F. (2d) 982 (CCA-7);

Banning v. United States, 130 F. (2d) 330, 339 (CCA-6);

Glasser v. United States, 315 U.S. 60, 63.

We respectfully submit that on the showing made by appellants in this case it would be a miscarriage of justice if this Court were to disturb the verdict and judgment of the forum below.

Dated, San Francisco,
May 26, 1943.

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